

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2017

PATRICK ALLEN JONES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

I.

Whether battery to a law enforcement officer under Wisconsin law falls within the force clause of the Armed Career Criminal Act (ACCA) and should thus be deemed a violent felony under that Act.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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PETITION FOR WRIT OF CERTIORARI

Patrick Allen Jones petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINION BELOW

The opinion of the Court of Appeals for the Eighth Circuit is reported at 870 F.3d 750, and is reprinted in the appendix hereto (Appendix A).

The judgment of the United States District Court for the District of Minnesota (Tunheim, J.) is available electronically at 2016 WL 4186929. A copy of this electronic citation is reprinted in the appendix hereto (Appendix B).

JURISDICTION

Petitioner Patrick Jones entered a plea of guilty to unlawfully possessing a firearm as a felon in violation of Title 18, United States Code, Section § 922(g)(1). He was sentenced to 188 months by the Honorable John R. Tunheim, United States District Judge (the Chief Judge at the time of his decision) for the District of Minnesota.

The United States Court of Appeals for the Eighth Circuit affirmed in a published opinion filed August 29, 2017.

The jurisdiction of this Court to review the judgment of the Eighth Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This Petition involves provisions of the United States Code and statutes of the State of Wisconsin:

* * *

18 U.S.C. § 924(e)(1) and (e)(2)(B)

(e)(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

(e)(2)(B) the term “violent felony” means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that--

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another . . .

* * *

Wisconsin Statute § 940.20(2) (1998)

(2) BATTERY TO LAW ENFORCEMENT OFFICERS AND FIRE FIGHTERS. Whoever intentionally causes bodily harm to a law enforcement officer or fire fighter, as those terms are defined in s. 102.475(8)(b) and (c), acting in an official capacity and the person knows or has reason to know that the victim is a law enforcement officer or fire fighter, by an act done without the consent of the person so injured, is guilty of a Class D felony.

* * *

Wisconsin Statute § 939.22(4) (1998)

(4) “Bodily harm” means physical pain or injury, illness, or any impairment of physical condition.

* * *

INTRODUCTION

The question here is whether Wisconsin’s battery-to-a-law-enforcement statute, based on the state’s misdemeanor (“simple”) battery offense, fits within ACCA’s force clause, which reaches offenses that have “as an element the use, attempted use, or threatened use of physical force against the person of another.” 18 U.S.C. § 924(e)(2)(B)(i). This involves an unresolved question about the force clause.

This Court has only ever accepted one case dealing with ACCA’s force clause: *Curtis Johnson v. United States*, 559 U.S. 133 (2010). In it, this Court addressed the meaning of the term, “physical force.” Based on dictionary definitions and the statutory context, it defined the term as “*violent* force,” “strong physical force,” or a “substantial degree of force.” *Id.* at 138-45 (emphasis in original). It expounded on the first definition in the prior sentence, *violent force*, as being “force capable of causing physical pain or injury to another person.” *Curtis Johnson*, 559 U.S. at 140.¹ Later, in a case addressing a different statutory provision, the Court noted that just what *Johnson* meant by “pain” and “injury” was an open question. *United States v. Castleman*, 134 S. Ct. 1405, 1413 (2014). But as explained more fully below, the statutory context and the discussion in *Curtis Johnson* strongly suggest that more than de minimis pain or injury is required, and that not all conduct capable of causing sufficient pain or injury qualifies as violent force.

The state offense here requires the intentional causation of physical pain or injury. Wisconsin case law defines “physical pain” to include “mild discomfort,” such

¹ *Johnson*’s holding was about a common-law-style state battery statute, covering offensive touching—the Court held that such a statute doesn’t fit within the force clause. *Id.*

that throwing urine at another person is a battery, so long as the victim reports a momentary stinging sensation. *State v. Higgs*, 601 N.W.2d 653 (Wis. Ct. App. 1999). This is unusual—there are similar cases addressing common-law-type battery statutes, but perhaps none other than *Higgs* dealing with a pain-or-injury battery statute. See, e.g., *People v. Walker*, 683 N.E.2d 1296, 1301 (Ill. 1997) (Illinois battery offense covering “insulting, provocative, or unwanted” contact applies to urine-throwing); see also *Ortega-Mendez v. Gonzales*, 450 F.3d 1010, 1017 (9th Cir. 2006) (holding that California’s battery statute does not fit within 18 U.S.C. § 16’s force clause because it covers actions like urine-throwing).

In this case, the dispute is about whether Wisconsin simple battery requires “violent force”; this focuses on whether Wisconsin’s definition of “pain” fits within *Johnson*’s reference to “pain.” What is the sort of “pain” that implies violent force? Mr. Jones argues that Wisconsin simple battery does not fit within the force clause because of its broad definition of “pain”—you can cause “mild discomfort” through low-level, non-violent action. Imagine pinching someone or hitting them with a flicked rubber band or a spitball. All of these cause mild discomfort, but do they indicate the kind of physical force that *Curtis Johnson* referred to as strong or substantial physical force that you can characterize as violent force? Put another way, does any pain suffice, even if it is de minimis? *Curtis Johnson* doesn’t expressly say. So how should federal courts define “pain” under the force clause? These questions are worthy of this Court’s review because the answers to them determine whether people like Mr. Jones face (a) 0 to 10 years in prison or (b) 15 years to life in prison.

Since this Court struck down ACCA's residual clause as unconstitutionally vague, the importance of the force clause has increased dramatically. *See Samuel Johnson v. United States*, 135 S. Ct. 2551 (2015) (striking down the residual clause). And while this Court has accepted many cases addressing ACCA's generic burglary offense, *see, e.g., Mathis v. United States*, 136 S. Ct. 2243 (2016), it has said very little about the force clause. In the past, the residual clause swept up most crimes that could even arguably fit within ACCA's force clause. But now that the residual clause is void, it is critical for this Court to define the limits and contours of the force clause, and this case is an excellent vehicle for doing so.

STATEMENT OF THE CASE

In 2004, Patrick Jones pled guilty to violating 18 U.S.C. § 922(g)(1) by illegally possessing a firearm as a felon. The Presentence Report (PSR) indicated that he had been convicted of battery to a law-enforcement officer in 1998 under Wisconsin law. *United States v. Jones*, 2016 WL 4186929, at *1 (D. Minn. Aug. 8, 2016). At sentencing, the district court concluded that Mr. Jones had at least three prior convictions that constituted violent felonies under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e), which thus increased his punishment range from (a) 0 to 10 years' imprisonment to (b) 15 years' to life imprisonment. *Id.* The district court sentenced him to 188 months in prison. *Id.* He did not appeal. *Id.*

After the Supreme Court struck down the ACCA's residual clause last year in *Samuel Johnson*, Mr. Jones moved the district court for relief under 28 U.S.C. § 2255, arguing that fewer than three of his prior convictions qualified as predicate convictions under the ACCA. *United States v. Jones*, 870 F.3d 750, 751-52 (8th Cir.

2017). The government opposed, arguing that four of Mr. Jones’s prior convictions still qualified as violent felonies under the ACCA’s remaining clauses, the enumerated-offenses and force clause. *Id.* at 752. The district court determined that one of these convictions was not a violent felony, but it concluded that the other three were and it therefore denied his § 2255 motion. *Jones*, 2016 WL 4186929, at *3, *5, *7-8.

One of these three convictions was the battery conviction, and the district court concluded that it qualified as a violent felony under the force clause. *Id.* at *6-7. The force clause includes offenses that have “as an element the use, attempted use, or threatened use of physical force against the person of another.” 18 U.S.C. § 924(e)(2)(B)(i). Because the court found that reasonable jurists could disagree with its conclusion that the battery conviction fell within the force clause, it issued a certificate of appealability on this issue. *Id.* at *7-8.

Mr. Jones timely appealed, arguing that his conviction of battery to a law-enforcement officer did not categorically fall within the force clause. He first observed that the statute of conviction was, for force-clause purposes, materially indistinguishable to the state’s simple misdemeanor battery statute. Except for the victim’s status (a law-enforcement officer) and the defendant’s knowledge about this status, the standard for battery to a law-enforcement officer mirrors the state’s simple misdemeanor battery statute. *Compare* Wis. Stat. § 940.20(2) (1998), *with* Wis. Stat. § 940.19(1) (1998). The common elements of these statutes, which are all that are relevant for the force-clause analysis, require intentionally causing “bodily harm” without the victim’s consent. *Id.* Bodily harm, in turn, means any “physical

pain or injury, illness, or any impairment of physical condition.” *Id.* § 939.22(4) (1998).²

Because the statute does not explicitly require force—let alone specify the degree of force necessary to convict—Mr. Jones argued that you must examine the result (pain, one of the definitions of bodily harm) to determine whether causing that result requires the force necessary to fit within the force clause. Wisconsin case law analyzing whether a battery was committed has established a principle for determining when the defendant caused the necessary pain: did the defendant’s actions “cause[] a localized physical lack of well-being or physical uneasiness that, at the very least, qualifie[s] as mild discomfort.” *Higgs*, 601 N.W.2d at 660. Using this principle, Mr. Jones argued that the range of conduct that causes de minimis pain like mild discomfort (e.g., pinching someone or hitting them with a flicked rubber band or spit ball) is categorically broader than the range of conduct that qualifies as strong or substantial physical force that can be characterized as violent. The Wisconsin battery statute is thus broader than the force clause and is not a violent felony.

The Eighth Circuit rejected this argument, though it agreed on the analytical approach. The court recognized that under the categorical approach, a conviction under the state battery statute must “*necessarily*” fit within the force clause in order to be a violent felony. *Jones*, 870 F.3d at 752 (internal quotation marks

² More serious batteries, such as substantial battery and aggravated battery are differentiated by the level of harm intended or inflicted: “substantial bodily harm” or “great bodily harm” instead of mere “bodily harm.” See *id.* § 940.19.

omitted) (emphasis in original). And that only the elements required by the crime, such as the “bodily harm” element matter when answering this question. *Id.* How a particular defendant factually violated the statute is irrelevant. *Id.* The court also recognized that it was bound by how Wisconsin courts interpret their statutes: “[i]f Wisconsin interprets § 940.20(2) to criminalize conduct that does not amount to violent force, then a conviction for battery of a law enforcement officer in Wisconsin is not categorically a violent felony for purposes of the ACCA.” *Id.* at 753.

The court also recognized that “Wisconsin’s statute may be interpreted as defining ‘bodily harm’ broadly.” *Id.* But it concluded that he lost because he “has not identified, and we have not found, a case in which a Wisconsin court affirmed a conviction under § 940.20(2) based on conduct that fails to rise to the level required by *Curtis Johnson*.” *Id.* *Higgs* did not help his case because the defendant in that case testified that the urine thrown in his face in fact caused him pain. *Id.* Because that conduct actually resulted in pain, it necessarily was capable of causing pain. *Id.*

REASON FOR GRANTING THE WRIT

“Physical force” under the ACCA force clause requires more than de minimis pain because the ACCA is intended to apply to especially violent recidivists. It shouldn’t be interpreted to include a battery statute that punishes as little as a defendant causing mild discomfort.

The issue in this case—whether a Wisconsin conviction for battery to a law-enforcement officer under Wis. Stat. § 940.20(2) (1998) qualifies as a violent felony under the Armed Career Criminal Act (ACCA)—is exceptionally important for two reasons. First, the consequences of applying the ACCA to enhance a sentence are draconian: it increases the punishment from (a) 0 to 10 years’ imprisonment to (b) 15 years’ to life imprisonment. Second, the Eighth Circuit’s (incorrect) conclusion that this battery conviction qualifies as a violent felony is based on a flawed interpretation of the ACCA’s force clause and this Court’s precedent in *Curtis Johnson v. United States*, 559 U.S. 133 (2010), thereby rendering the force clause much broader than intended. This flawed interpretation subjects people like Mr. Jones to a draconian sentencing enhancement that should be reserved for more dangerous criminals.

The Supreme Court’s opinion in *Curtis Johnson* defined the term *physical force* in the ACCA force clause as “*violent force*—that is, force capable of causing physical pain or injury to another person.” *Curtis Johnson v. United States*, 559 U.S. 133, 140 (2010) (emphasis in original). But how much pain is enough? Is any pain sufficient, even if it is de minimis? *Curtis Johnson* doesn’t expressly say.

The better interpretation is that de minimis pain such as physical uneasiness and mild discomfort is not sufficient. Look at how the Supreme Court tackled the meaning of *physical force* in *Curtis Johnson*. It turned to context: “[u]ltimately, context determines meaning.” *Id.* at 139. And the context is that the force clause is itself defining the term *violent felony*. *Id.* at 140. *Curtis Johnson* reasoned that the word *violent* in the ACCA “connotes a substantial degree of force.” *Id.* The Court illustrated this point by citing the following three dictionary definitions of *violent*: (1) “moving, acting or characterized by physical force, esp. by *extreme* and sudden or by unjust or improper force; *furious*; *severe*; *vehement*”; (2) “characterized by the exertion of *great physical force or strength*”; and (3) “of, relating to, or characterized by *strong* physical force.” *Id.* (brackets, internal citations, and internal quotation marks omitted) (emphasis added). When *violent* is paired with the word *felony*, “its connotation of strong physical force is even clearer.” *Id.* The Court illustrated the point by noting that *Black’s Law Dictionary* defined *violent felony* as “characterized by extreme physical force, such as murder, forcible rape, and assault and battery with a dangerous weapon.” *Id.* at 140-41 (quoting *Black’s Law Dictionary* 1706 (9th ed. 2009)). And when the Court defined *physical force* as *violent force*, it specifically emphasized the word *violent*. *Id.* at 140. So while one may struggle with just exactly how much pain is enough (line drawing is hard), it makes no sense to conclude that physical uneasiness and mild discomfort are enough pain because such de minimis pain has no connection to the controlling context (i.e., words like *violent*, *felony*, and *violent felony*).

A contrary interpretation leads to absurd results, especially when you factor in that the definition only requires force that *is capable of causing* physical pain. Pinching someone or hitting them with a spitball or a flicked rubber band is capable of causing physical uneasiness and mild discomfort. Many people—perhaps all—have experienced being hit by a flicked rubber band from a bully. And when the rubber band hits bare skin, it stings and may even leave a red mark as physical evidence that your body has been harmed. At the very least, this qualifies as physical uneasiness and mild discomfort. Were an arrested person to flick a rubber band at a cop and hit them, they almost certainly be charged with battery (after all, the stinging sensation in *Higgs* was enough to lead to charging and a conviction). But no reasonable person would suggest that such conduct would satisfy the ACCA’s force clause.

In sum, if *pain* under the force clause includes even de minimis pain, then virtually any action—including even unwanted touching—is capable of causing such pain. While this may be enough to qualify as bodily harm under some state’s battery laws, it cannot be enough to qualify as pain under the force clause.

Having established that there must be some threshold for ACCA pain that exceeds de minimis pain, the next question is how much pain is required under Wisconsin law? Very little. The bodily harm element in Wisconsin battery can be proven by showing de minimis pain. *State v. Higgs*, 601 N.W.2d 653, 660 (Wis. Ct. App. 1999). A defendant need cause only physical uneasiness and mild discomfort: “the element of bodily harm is established” because “Higgs’s actions caused a localized physical lack of well-being or physical uneasiness that, at the very least,

qualified as mild discomfort.” *Id.* So physical uneasiness and mild discomfort are enough to prove the bodily harm element of battery under Wisconsin law. But this extremely low threshold for pain under Wisconsin law is not—and cannot—be enough to qualify as pain under the ACCA’s force clause. A contrary interpretation runs counter to *Curtis Johnson*’s reasoning about what the term *physical force* means and it leads to absurd results.

There must be some limits to the term *pain* as *Curtis Johnson* uses it. This case highlights that those limits must exclude convictions based on nothing more than conduct that causes a person only physical uneasiness and mild discomfort.

CONCLUSION

For all these reasons, Petitioner asks the Court to grant this Petition for a Writ of Certiorari.

Dated: November 27, 2017

Respectfully submitted,

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